

**Filed 7/13/10 by Clerk of Supreme Court
IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

2010 ND 128

State of North Dakota,

Plaintiff and Appellee

v.

Gene Walter Colby,

Defendant and Appellant

No. 20100057

Appeal from the District Court of Ward County, Northwest Judicial District,
the Honorable Gary H. Lee, Judge.

AFFIRMED.

Per Curiam.

Kelly A. Dillon (on brief), Assistant State's Attorney, Courthouse, P.O. Box
5005, Minot, N.D. 58702-5005, for plaintiff and appellee.

Faron E. Terry (on brief), 216 South Broadway, Suite 3, P.O. Box 717, Minot,
N.D. 58702-0717, for defendant and appellant.

State v. Colby

No. 20100057

Per Curiam.

[¶1] Gene Colby appeals a criminal judgment entered after his conditional plea of guilty, convicting him of driving under the influence. He argues he was subjected to double jeopardy in the criminal proceedings, because his commercial driving privileges had already been disqualified for life. He also argues he was deprived of procedural due process when the district court denied his motion to dismiss without first holding a hearing.

[¶2] We summarily affirm under N.D.R.App.P. 35.1(a)(7). Colby was not subjected to double jeopardy in the criminal proceedings. See State v. Zimmerman, 539 N.W.2d 49 (N.D. 1995) (holding criminal prosecution following administrative license suspension does not violate double jeopardy under the U.S. Constitution); State v. Jacobson, 545 N.W.2d 152 (N.D. 1996) (same holding under the North Dakota constitution). Colby relies on Bienek v. Dep't of Transp., 2007 ND 117, 736 N.W.2d 492, for the proposition that he was “convicted” administratively, but his reliance is misplaced. In Bienek, this Court held an administrative license suspension of noncommercial driving privileges was a “conviction” as defined in N.D.C.C. § 39-06.2-02(8) and thus counted as one of two “convictions” that resulted in the loss of Bienek’s commercial driving privileges for life under N.D.C.C. § 39-06.2-10(8). Bienek v. Dep't of Transp., 2007 ND 117, ¶¶ 10-11, 736 N.W.2d 492. The definition of “conviction” in Bienek, however, applied only to chapter 39-06.2. N.D.C.C. § 39-06.2-02(8) (“As used in this chapter . . . “[c]onviction means . . . a determination that a person has violated or failed to comply with the law.”) (emphasis added). The criminal offense of DUI is not governed by chapter 39-06.2. Additionally, Colby was not deprived of procedural due process when the district court denied his motion to dismiss without first holding a hearing, because his motion and brief were not timely served and filed. See N.D.R.Ct. 3.2(a)(3) (“If any party who has timely served and filed a brief requests oral argument, the request must be granted.”) (emphasis added); see also Guardianship of Norman, 521 N.W.2d 395, 396-97 (N.D. 1994) (because brief and request for oral argument were filed before deadline, district court was required to consider request).

[¶3] The criminal judgment is affirmed.

[¶4] Gerald W. VandeWalle, C.J.
Dale V. Sandstrom
Daniel J. Crothers
Mary Muehlen Maring
Carol Ronning Kapsner